

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

DOROTHY M.,

Plaintiff,

v.

Civil Action No.
6:22-CV-0245 (DEP)

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LAW OFFICE OF
PETER W. ANTONOWICZ
148 West Dominick Street
Rome, NY 13440

PETER ANTONOWICZ, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
6401 Security Boulevard
Baltimore, MD 21235

SHANNON FISHEL, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff

seeks judicial review of an adverse administrative determination by the Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. § 405(g) are cross-motions for judgment on the pleadings.¹ Oral argument was conducted in connection with those motions on June 7, 2023, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff’s motion for judgment on the pleadings is

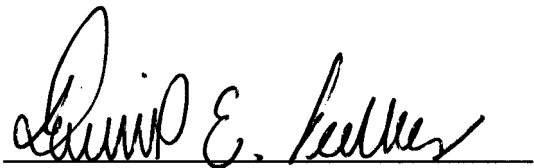
¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

GRANTED.

2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

A handwritten signature in black ink, appearing to read "David E. Peebles", is written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: June 13, 2023
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
DOROTHY M.,

Plaintiff,

vs.

22-CV-245

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
-----x

DECISION - June 7, 2023

the HONORABLE DAVID E. PEEBLES

United States Magistrate-Judge, Presiding

APPEARANCES (by telephone)

For Plaintiff: PETER W. ANTONOWICZ, ESQ.
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For Defendant: SOCIAL SECURITY ADMINISTRATION
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1 THE COURT: Let me begin my decision by thanking
2 you both for excellent written and oral presentations.

3 I have before me an action in which the plaintiff
4 has challenged an adverse determination by the Acting
5 Commissioner of Social Security finding that she was not
6 disabled at the relevant times and therefore ineligible for
7 the disability insurance benefits that she sought.

8 The action is brought pursuant to 42, United States
9 Code, Section 405(g). The background is as follows.

10 Plaintiff was born in November of 1966. She is currently 56
11 years of age. She was 51 years old at the alleged onset of
12 her disability on March 1, 2018. Plaintiff lives in a house
13 in Rome, New York, with her husband. She stands 5-foot
14 2-inches in height, and at relevant times weighed
15 approximately 226 pounds. Plaintiff has a twelfth grade
16 education and while in school attended regular classes.

17 Plaintiff stopped working on March 1, 2018,
18 according to her function report. While employed she worked
19 in accounts receivable, as an Arc counselor, as an overseas
20 travel coordinator position she held approximately ten years,
21 and she worked scheduling and setting up video conferences.
22 She also worked in 2018 and 2019 as a stay-at-home daycare
23 provider, although it did not -- the income generated from
24 that position did not rise to a substantial gainful activity
25 level, or SGA. Significantly, plaintiff collected

1 unemployment insurance benefits for three-quarters of 2020.

2 Plaintiff suffers physically from fibromyalgia;
3 left hip trochanteric bursitis/osteoarthritis; multilevel
4 degenerative disc disease; irritable bowel syndrome-C;
5 esophageal varices; gastroesophageal reflux disease, or GERD;
6 hyperlipidemia; obesity; depression; Type 2 diabetes;
7 nonalcoholic steatohepatitis, or NASH; nausea; and leg edema.

8 Plaintiff treats primarily with Dr. Daniel Goodman,
9 who has been her primary care provider since March of 2018.
10 She also sees physician's assistant, or PA, Marcy Gambino, as
11 well as other specialists, including a gastroenterologist, an
12 endocrinologist, a rheumatologist, and an orthopedic surgeon.

13 Plaintiff's activities of daily living include some
14 cooking, some cleaning. She can shower. She can dress,
15 although sometimes needs help in that area, watches
16 television, listens to the radio. She can read. She
17 socializes with friends. She can shop. She walks dogs, and
18 occasionally cares for her grandchildren.

19 Procedurally, plaintiff applied for Title II
20 benefits under the Social Security Act on January 10, 2020,
21 alleging an onset date of March 1, 2018.

22 At page 205 in her function report she claimed
23 disability based on fibromyalgia, fatigue, plantar fasciitis,
24 IBS-C, bilateral hip bursitis, carpal tunnel syndrome,
25 headaches, complications from breast reconstruction surgery,

1 and cirrhosis of the liver, or fatty liver.

2 A hearing was conducted on March 16, 2021, by
3 Administrative Law Judge Bruce Fein to address plaintiff's
4 application for benefits. ALJ Fein issued an adverse
5 decision on April 5, 2021. That became a final determination
6 of the Agency on February 1, 2022, when the Social Security
7 Appeals Council denied plaintiff's application for review.
8 This action was commenced on March 14, 2022, and is timely.

9 In his decision, ALJ Fein applied the familiar
10 five-step test for determining disability, first noting that
11 plaintiff was or will be insured under Title II through
12 December 31 of this year.

13 He then concluded at step one that plaintiff did
14 not engage in SGA after her onset date, again noting the
15 income from 2018 and 2019, but finding that that did not meet
16 SGA levels.

17 At step two ALJ Fein concluded that plaintiff
18 suffers from severe impairments that impose more than minimal
19 limitations on her ability to perform basic work functions,
20 including left hip trochanteric bursitis/osteoarthritis,
21 fibromyalgia, and multilevel degenerative disc disease. He
22 rejected plaintiff's IBS-C, diabetes, obesity, depression,
23 GERD, and others, including mental conditions, as not
24 sufficiently severe. Also specifically rejected a conclusion
25 by Dr. Goodman, plaintiff's primary physician, that

1 plaintiff's condition meets or medically equals listing 5.05
2 and is therefore a presumptively disabling condition, noting,
3 among other things, that Dr. Goodman did not treat plaintiff
4 for her liver disease.

5 At step three the administrative law judge
6 concluded that plaintiff's conditions do not, in fact, meet
7 or medically equal any of the listed presumptively disabling
8 conditions, specifically referencing 1.02, 1.04, 14.09, and
9 SSR 12-2p relating to fibromyalgia. After surveying the
10 available evidence, ALJ Fein concluded that plaintiff is
11 capable of performing less than the full range of sedentary
12 work, specifying that she cannot climb ladders, ropes and
13 scaffolds. She can occasionally climb ramps and stairs,
14 balance, stoop, kneel, crouch and crawl. She can frequently
15 handle and finger with bilateral hands. The claimant should
16 avoid concentrated exposure to extreme temperatures and
17 pulmonary irritants.

18 Applying that RFC finding, ALJ Fein concluded at
19 step four that plaintiff is capable of performing her past
20 relevant work as a travel agent, a telecommunication
21 specialist and accounting clerk, as both actually and as
22 generally performed in the national economy.

23 He also made an alternative finding at step five
24 that plaintiff is also capable of performing as a charge
25 account clerk and a surveillance system monitor, but noted

1 that there are only 962 available jobs as charge account
2 clerk, and 2,900 as surveillance system monitor, something
3 which I think everyone concedes would not suffice to support
4 a step five finding, it's not a sufficient number of
5 available jobs.

6 As you know, the Court's function in this case is
7 limited. The standard that I apply is extremely deferential.
8 I must determine whether correct legal principles were
9 applied and the result is supported by substantial evidence,
10 which is defined as such relevant evidence as a reasonable
11 mind would accept as adequate to support a conclusion. It is
12 a high bar for a claimant, as noted by the Second Circuit in
13 *Brault versus Social Security Administration Commissioner*,
14 683 F.3d 443, Second Circuit, 2012, a standard which has been
15 reiterated many times, including most recently in *Schillo v.*
16 *Kijakazi*, 31 F.4th 64, from April 6th, 2022.

17 In this case plaintiff has raised multiple
18 contentions. She claims that the residual functional
19 capacity finding is not supported, noting that there is no
20 medical source opinion provided by consultative examiner
21 Dr. Jenouri. She claims that it was improper for the
22 administrative law judge to rely on her receipt of
23 unemployment benefits as a basis to draw adverse inferences.
24 She argues there is no logical bridge given by the
25 administrative law judge between her activities of daily

1 living and the ability to perform work on an eight-hour day,
2 five-day-a-week basis. She argues that errors are harmful
3 because if plaintiff is unable to concentrate up to one-third
4 of the day, she would be limited to unskilled work and two
5 jobs in insufficient numbers at step five.

6 She also concludes that there is an error at step
7 two in not finding that her NASH constituted a severe
8 impairment, arguing that it resulted in fatigue which was not
9 properly considered by the administrative law judge.

10 Addressing first the step two argument, the
11 governing regulations provide that an impairment or
12 combination of impairments is not severe if it does not
13 significantly limit a claimant's physical or mental ability
14 to do basic work activity. That section goes on to describe
15 what is meant by the phrase basic work activities, defining
16 that term to include the abilities and aptitudes necessary to
17 do more jobs.

18 It is true that the second step requirement is
19 de minimis and intended to screen out only the truly weakest
20 of cases. However, the mere presence of a disease or
21 impairment or that establishing that a person has been
22 diagnosed or treated for a disease or impairment is not by
23 itself sufficient to establish a condition as severe. And,
24 of course, the burden is on the plaintiff to not only
25 establish her condition but also limitations related or

1 stemming from it.

2 Plaintiff testified to experiencing fatigue due to
3 her fibromyalgia. That's at page 40 of the Administrative
4 Transcript. The administrative law judge specifically
5 referenced fatigue when outlining plaintiff's claims at the
6 bottom of page 16 and the top of page 17 of the
7 Administrative Transcript. He found fibromyalgia, of course,
8 to be a severe impairment and proceeded to the remaining
9 steps of the sequential evaluation. So I find that any error
10 in that regard is harmless, and that fatigue was, in fact,
11 taken into consideration by the administrative law judge who
12 relied on the state administrative findings for his
13 determination.

14 Next, the argument surrounds the residual
15 functional capacity, and specifically the consideration of
16 plaintiff's subjective symptoms. Under the step two review
17 protocol applicable to Social Security cases for assessing
18 the claimant's subjective reports, an ALJ must first
19 determine whether an individual has a medically determinable
20 impairment that could reasonably be expected to produce the
21 alleged symptoms. If that finding is made, the ALJ must then
22 evaluate the intensity and persistence of those symptoms and
23 determine the extent to which they limit the claimant's
24 ability to perform work-related activities.

25 Social Security Ruling 16-3p sets out this in some

1 more detail and articulates factors to be considered,
2 including daily activities, or location, duration, frequency
3 and intensity of pain or other symptoms, factors that
4 precipitate or aggravate the claimant's symptoms, the type,
5 dosage, effectiveness and side effects of medication, any
6 treatment other than medication that is used to relieve the
7 symptoms, other measures to obtain relief of symptoms and any
8 other relevant factors.

9 In this case the administrative law judge relied on
10 plaintiff's activities of daily living, which is a proper
11 consideration. The fact that she was able to perform some
12 work in 2018 and 2019, he explained his reasoning at page 16
13 through 20. He relied on the receipt of unemployment
14 benefits, and although he did not specifically rely solely on
15 that, it is a proper consideration. In *Wright versus*
16 *Berryhill*, 687 F.App'x 45, from the Second Circuit, April 14,
17 2017, it was noted that a plaintiff's representation of
18 readiness and ability to work in connection with his receipt
19 of unemployment benefits is a proper factor.

20 The bottom line is a determination of what we used
21 to call credibility; the analysis of subjective symptoms
22 claimed by a plaintiff is entitled to considerable deference
23 if it is supported by substantial evidence, which I find to
24 be the case here.

25 There is also a claim that medical opinions were

1 not properly considered. Because plaintiff's application was
2 filed after March 27, 2017, this case is subject to the
3 amended regulations regarding opinion evidence. Under those
4 regulations, the Commissioner does not defer or give any
5 specific evidentiary weight, including controlling weight, to
6 any medical opinions, including those from medical sources.
7 But rather -- the plaintiff's medical sources, I should say.
8 But rather, will consider whether those opinions are
9 persuasive, primarily considering whether they're supported
10 by and consistent with the record in the case.

11 In this case Dr. Goodman, plaintiff's treating
12 physician, provided a medical source statement dated
13 October 22, 2020. It appears at pages 2034 through 2038 of
14 the Administrative Transcript. It is considerably more
15 limiting than the residual functional capacity. It finds
16 that plaintiff can only sit for thirty minutes at a time and
17 stand for twenty minutes at a time, can walk or stand less
18 than two hours, and sit less than -- about four hours in an
19 eight-hour workday. It would require more than ten
20 unscheduled breaks during an eight-hour workday. And it
21 opines that plaintiff would be likely absent more than four
22 days a month.

23 The administrative law judge considered that
24 opinion and discussed it at page 21 of the Administrative
25 Transcript and found it to be less persuasive. The reasons

1 given are; one, the extreme limitations are inconsistent with
2 the relatively benign findings in Dr. Goodman's and other
3 treatment provider notes, which were summarized earlier in
4 the decision; and two, it was noted that this provider does
5 not treat the plaintiff for the impairments identified as the
6 cause of the restrictions, noting instead that the plaintiff
7 was treated by a gastroenterologist, a rheumatologist and an
8 endocrinologist.

9 I find that if the decision is read as a whole,
10 there is no violation of the regulations. The other opinions
11 relied on and referenced in the decision include from Drs. C.
12 Krist from July 14, 2020, a non-examining state agency
13 consultant, and Dr. J. Koenig, from October 2, 2020, also a
14 non-examining state agency consultant. They are similar, and
15 it was noted that they are persuasive, although the
16 administrative law judge found the plaintiff more limited
17 than opined by those two doctors.

18 And then there is a medical source of what would be
19 normally an opinion from Dr. Gilbert Jenouri, dated July 7,
20 2020, who examined the plaintiff. It appears at 1931 to 1934
21 of the Administrative Transcript. In his opinion Dr. Jenouri
22 made several observations that were what I would consider to
23 be positive findings; plaintiff's gait was unsteady, can walk
24 on heels and toes with difficulty, can squat only 70 percent.
25 In terms of musculoskeletal there are also limitations in

1 range of motion noted, and there are trigger points for
2 fibromyalgia, including bilateral shoulders and bilateral
3 lumbar area. There is no medical source statement,
4 unusually. On page 1934 it abruptly ends with a diagnosis
5 and a statement, "dictation ended here."

6 The court in *Townsend versus Commissioner of Social*
7 *Security*, 2018 WL 6697001, from the Western District of
8 New York, noted the following: A complete consultative
9 examination report includes the claimant's primary
10 complaints, a description of the history of those complaints,
11 examination findings, laboratory or other test results, a
12 diagnosis and prognosis, and a statement about what the
13 claimant can do despite her impairments.

14 I recognize, as the Commissioner has argued, that
15 the controlling regulation 20 CFR Section 404.1519n
16 specifically notes that, "The medical report must be complete
17 enough to help us determine the nature, severity, and
18 duration of the impairment, and residual functional capacity.
19 The medical source's report of the consultative examination
20 should include the objective medical facts as well as
21 observations and opinions." It goes on to say, however, as
22 the Commissioner has argued, "Although we will ordinarily
23 request a medical opinion as part of the consultative
24 examination process, the absence of a medical opinion in a
25 consultative examination report will not make the report

1 incomplete." In this case I think it was error not to
2 recontact Dr. Jenouri. I think this was a complete oversight
3 on his part, and I think it was harmful error.

4 Dr. Goodman found limitations on, among other
5 things, plaintiff's ability to sit for six hours as required
6 and sedentary work. Dr. Goodman opined four. He also
7 imposed greater limitations on the ability to lift and carry.
8 And I think this is significant because the ALJ rejected, or
9 I should say found Dr. Krist's and Dr. Koenig's opinions to
10 be persuasive but found that the plaintiff is more limited.
11 The question is how much more and on what basis did the ALJ
12 make that determination? Did he interpret the raw data from
13 Dr. Jenouri's opinion or from the medical record? In my view
14 Dr. Jenouri should have been contacted and asked for a
15 medical source statement that would have provided a basis for
16 the residual functional capacity determination.

17 So I think this is harmful error. There is no
18 medical opinion on point supporting the residual functional
19 capacity. I think remand is required. I don't find any
20 persuasive proof of disability, but I will grant judgment on
21 the pleadings to the plaintiff, vacate the Commissioner's
22 determination, and remand the matter for further
23 consideration consistent with this opinion.

24 Thank you both for excellent presentations. I hope
25 you have a good afternoon.

* * *

C E R T I F I C A T I O N

I, EILEEN MCDONOUGH, RPR, CRR, Federal Official
Realtime Court Reporter, in and for the United States
District Court for the Northern District of New York,
do hereby certify that pursuant to Section 753, Title 28,
United States Code, that the foregoing is a true and correct
transcript of the stenographically reported proceedings held
in the above-entitled matter and that the transcript page
format is in conformance with the regulations of the
Judicial Conference of the United States.

Eileen McDonough

EILEEN MCDONOUGH, RPR, CRR
Federal Official Court Reporter